

March 30, 2006

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands* – WT Docket No. 03-66 –
WRITTEN EX PARTE PRESENTATION

Dear Ms. Dortch:

On behalf of the Wireless Communications Association International, Inc. (“WCA”), I am writing to make two points in response to the March 28th *ex parte* submission by the National ITFS Association (“NIA”) and the Catholic Television Network (“CTN”) regarding their proposals to restrict the maximum permissible term of Educational Broadband Service (“EBS”) spectrum leases.¹

First, NIA and CTN naïvely appear to suggest that the Commission disregard the economic evidence in the record while crafting rules to govern EBS leasing. NIA and CTN do not contest that *all* of the economic evidence in this proceeding indicates that imposing abbreviated lease terms on EBS licensees will diminish commercial investment in the band. As WCA has noted, that evidence establishes that “[r]e-imposing lease restrictions on the EBS band could undermine the Commission’s vision for enhanced and more-efficient use of this band”² and that “any lease period shorter than 35 years will expose the investor to a substantial

¹ See Letter from Todd D. Gray, Counsel to NIA, and Edwin N. Lavergne, Counsel to CTN, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed Mar. 28, 2006) [“NIA/CTN Letter”].

² Ford and Koutsky, Phoenix Center for Advanced Legal & Economic Public Policy Studies, “Unnecessary Regulations and the Value of Spectrum: An Economic Evaluation of Lease Term Limits for the Educational Broadband Service,” Phoenix Center Policy Bulletin No. 14, at 5 (Feb. 2006), *submitted as an attachment to* Letter from Paul J. Sinderbrand, Counsel to WCA, to Hon. Kevin J. Martin, Chairman, FCC, WT Docket No. 03-66 (filed Feb. 17, 2006).

Marlene H. Dortch

March 30, 2006

Page 2

possibility of earning inadequate returns on investments.”³ One simply cannot ignore the economic realities confronting those deploying in the 2.5 GHz band, for those economic realities ultimately will dictate whether the Commission’s objectives in this proceeding are achieved.

The Commission’s principal goal in this proceeding has been to “[p]romote availability of broadband to all Americans, including broadband technologies for educators.”⁴ Here, as well as in numerous earlier proceedings, the Commission has recognized that the 2.5 GHz band has the potential to be used for a variety of innovative commercial broadband services to consumers, and that the revenues EBS licensees realize from leasing their spectrum are often essential to funding their use of the EBS spectrum for educational purposes. This latter point is key. As the Archdiocese of Los Angeles put it earlier in this proceeding, “[w]ithout [lease] revenues and technical assistance from our commercial partner, the Archdiocese would not be able to implement its technology plans and would be forced to eliminate wireless instructional technology from its schools.”⁵ Along the same lines, the Archdiocese of New York advised the Commission that usage of EBS “will be possible only if the Archdiocese can develop the commercial partnerships that will produce both needed revenue and access to new technologies that otherwise would be too expensive for the Archdiocese to acquire on its own.”⁶ Thus, it is not surprising that the Commission has stated that:

[R]evenues are key to this [BRS-EBS] partnership. Leasing channel capacity for the transmission of commercial programming generates revenues that may be vital to the continuing operations of authorized [EBS] systems, to the successful deployment in many markets of [EBS] service, and to the service’s public interest benefits.⁷

³ Declaration of Dr. Michael D. Pelcovits at 9, *submitted as an attachment to* Letter from Paul J. Sinderbrand, Counsel to WCA, to Hon. Kevin J. Martin, Chairman, FCC, WT Docket No. 03-66 (filed Mar. 10, 2006) (footnote omitted). Dr. Pelcovits also establishes that “[t]erm limits are not in the public interest,” that they “limit the utility of the spectrum to potential lessees,” “reduce the likelihood that the spectrum will be put to its best use,” and “are unnecessary and counterproductive to achieving the [Commission’s] educational goals.” *Id.* at 3.

⁴ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Notice of Proposed Rule Making and Memorandum Opinion and Order, 18 FCC Rcd 6722, 6740 (2003) [“NPRM”].

⁵ Comments of the Archdiocese of Los Angeles, WT Docket No. 03-66, at 2 (filed Sept. 8, 2003).

⁶ Comments of the Archdiocese of New York, WT Docket No. 03-66, at 2 (filed Sept. 8, 2003).

⁷ *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees To Engage in Fixed Two-Way Transmissions*, Notice of Proposed Rulemaking, 12 FCC Rcd 22174, 22202 (1997) quoting *Amendment of Part 74 of the Commission’s Rules Governing Use of the Frequencies in the Instructional Television Fixed Service*, Report and Order, 9 FCC Rcd 3360, 3364 (1994).

Marlene H. Dortch

March 30, 2006

Page 3

As such, the Commission cannot discount the challenging economic environment facing those hoping to deploy commercial broadband services utilizing leased EBS spectrum.⁸ The Commission's intertwined objectives of promoting the availability of wireless commercial broadband services and of advancing EBS educational services both require that the rules governing leasing are favorable to investment in the band. If maximum lease terms are too short, or if the Commission requires EBS leases to include mandatory contractual provisions that deter investment,⁹ those interested in deploying commercial broadband networks will look to other spectrum, and EBS licensees will be left without critical financial support.

Second, NIA and CTN simply are wrong in suggesting that, while there is no rule limiting EBS lease terms to a maximum of fifteen years, the *Report and Order* in this proceeding retained the Commission's former policy in this regard.¹⁰ Although they suggest that Paragraph 181 of the *Report and Order* supports their view, a careful reading of the *Report and Order* establishes otherwise.

The *Report and Order* acknowledges that "there is no reason to deprive licensees in the BRS/EBS spectrum of the benefits of [the *Secondary Markets*] rules and policies," and thus the

⁸ Indeed, since the mid-1980s the Commission has consistently adjusted its rules governing EBS leasing to promote the economic viability of the commercial operators, and thereby assure continuation of the financial support needed by most EBS licensees. See, e.g., *NPRM*, 18 FCC Rcd at 6766 ("As the MDS industry struggled to achieve commercial viability and ITFS operators sought to generate enough revenue to survive, we gradually relaxed the restrictions on channel leasing.").

⁹ In this regard, WCA must reiterate its concern with the proposal by CTN that conditions its support for 30 year lease terms on the Commission requiring every EBS lease to include provisions "which provide the EBS licensee at the 15th year and every 5 years thereafter, with the ability to review its educational use requirements so as to ensure the efficient and effective use of the EBS licensee's reserved capacity for educational purposes in light of changes in educational needs, technology and other relevant factors." See Letter from Todd D. Gray, Counsel to NIA, and Edwin N. Lavergne, Counsel to CTN, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66, at 2 (filed Mar. 17, 2006). Presumably, CTN is not merely proposing that an EBS licensee engage in a unilateral review of changes, but that the commercial lessee be required in some fashion to accommodate those needs. It is this latter, unspecified obligation on the part of the commercial lessee that would prove problematic, for it prevents an investor from today understanding what the operator's rights and obligations will be after 15 years. As the George Mason University Instructional Foundation cogently noted in opposing CTN's proposed language, "[q]uite frankly, GMUIF has no idea what would be required of the commercial system operator under such a provision, and we doubt that anyone thinking of investing capital to the 2.5 GHz band will know either." Letter from Michael Kelley, President of George Mason University Instructional Foundation, Inc., WT Docket No. 03-66, at 2 (filed March 30, 2006). Thus, as a practical matter, adoption of CTN's proposal would lead investors to view EBS leases, at best, as having 15 year terms – a term that even NIA and CTN recognize is far too short to generate investment in the band. While WCA is sensitive to CTN's desire for EBS leases to provide the licensee with an opportunity to adjust to changing circumstances, WCA continues to believe that this is something best left to individual contractual negotiations. Only through individualized negotiations can provisions be crafted that promise to meet the EBS licensee's future needs, while providing sufficient certainty that the commercial lessee's ability to attract investment is not hampered.

¹⁰ See NIA/CTN Letter at 2.

Marlene H. Dortch

March 30, 2006

Page 4

Commission decided to “extend the rules and policies adopted in the *Secondary Markets Report and Order* to the BRS/EBS spectrum.”¹¹ Although Paragraph 181 quotes a litany of former rules and policies that NIA and CTN had sought to retain, Paragraph 181 clearly states that the Commission elected to retain the “substantive use” requirements – “we will apply the spectrum leasing rules and policies adopted in the Secondary Markets proceeding to the BRS/EBS band, while grandfathering existing leases entered into under our prior leasing policy and retaining EBS substantive use requirements.”¹² This conclusion is fully reflected by the rule revisions adopted by the Commission, which do not include any special limit on the term of EBS leases, but do include in Sections 27.1214(a) and (b) the retained substantive use requirements.¹³ The new rules do not set any special cap on the length of an EBS lease because there are no such limits under the *Secondary Markets* regime and a lease term limit is not a “substantive use” restriction of the sort the Commission elected to retain. In other words, the new rules set forth in Appendix C of the *Report and Order* fully reflect the Commission’s intended departures from *Secondary Markets* rules with respect to EBS leasing, and do not include any restriction on EBS lease terms.

That the former policy of restricting leases to fifteen years was superseded by the transition to *Secondary Markets* effective January 10, 2005 is confirmed by the Commission’s actions since then. As WCA pointed out previously, the Commission has routinely granted applications for consent to *de facto* transfer leasing arrangements involving EBS spectrum with terms that exceed fifteen years. Appended hereto as Attachments A through I are the relevant exhibits from a sampling of applications for consent to EBS leasing that were filed and granted following January 10, 2005. Although NIA and CTN suggest otherwise, these attachments establish that in each and every case the Commission granted an application that clearly disclosed that the lease term would extend beyond fifteen years.

¹¹ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14233 (2004).

¹² *Id.* at 14234. Indeed, NIA and CTN implicitly concede that other proposals in this litany were not adopted by the Commission. For example, the quoted language reflected a NIA and CTN proposal that, despite the *de facto* transfer leasing policies, “only the ITFS licensee can file FCC applications for modification to its station’s facilities.” Yet, neither NIA nor CTN contend that this proposal – one fundamentally at odds with the *de facto* transfer leasing model – was adopted by the Commission.

¹³ *See id.* The revisions to Sections 1.9020 and 1.9030 adopted by the *Report and Order* generally apply the *Secondary Markets* rules to EBS, new Section 1.9047 makes clear that any EBS leases are subject to the provisions of newly-adopted Section 27.1214, and new Section 27.1214 provides that existing leases are grandfathered, that all EBS licensees engaged in leasing must make substantive use of their spectrum (with the amount of use depending upon whether digital or analog technology is deployed), and that all leases must provide the EBS licensee with the opportunity to purchase EBS equipment in the event that the lease is terminated by action of the lessee.

Marlene H. Dortch

March 30, 2006

Page 5

Pursuant to Section 1.1206(b)(1), this notice is being filed electronically with the Commission via the Electronic Comment Filing System for inclusion in the public record of the above-reference proceeding. Should you have any questions regarding this presentation, please contact the undersigned.

Respectfully submitted,

/s/ Paul J. Sinderbrand
Paul J. Sinderbrand

Counsel to the Wireless Communications
Association International, Inc.

Attachments

cc: Fred Campbell
John Giusti
Barry Ohlson
Aaron Goldberger
Catherine Seidel
Peter Corea
Walter Strack
Joel Taubenblatt
John Schauble

Attachment A

Application for Consent to *De Facto* Transfer Spectrum Lease from Morrisonville Consolidated Unit School District #1 to Unison Spectrum LLC, File No. 0002302105 (filed Sept. 6, 2005; granted Sept. 29, 2005).

Response to Schedule B, Questions 3(a) and 3(b)

Unison Spectrum LLC hereby notifies the Commission that the commencement date for the lease Agreement will be September 28, 2005. If however the Commission has not granted this long term de facto lease application by such date, the commencement date will be the date the FCC approves this application. The lease with respect to the license will not extend beyond: (i) the date such authorization expires by its terms; (ii) the date such application for renewal is dismissed or denied with prejudice by the FCC; or (iii) the expiration of the term or the termination of the Agreement pursuant to the early termination provisions of the Agreement ("Lease Termination Date"). The parties will notify the FCC of the actual Lease Commencement Date and Lease Termination Date once they are determined. The lease is renewable with respect to the license through September 27, 2035, subject to applicable FCC Rules and necessary approvals.

Licenses

CALL SIGN	RADIO SERVICE	LEASE COMMENCEMENT DATE	LEASE TERMINATION DATE
WLX854	ED	09/28/2005	04/30/2013

Attachment B

Application for Consent to *De Facto* Transfer Spectrum Lease from Orange Catholic Foundation to Nextwave Broadband Inc., File No. 0002434215 (filed Jan. 1, 2006; granted Jan. 25, 2006).

Response to Schedule B, Question 3(a) and 3(b)

Pursuant to Section 1.9030(f) of Commission rules, the term of the long term *de facto* spectrum lease Agreement for EBS Station WHG396 will commence on the date the FCC's grant of the foregoing FCC Form 603-T application becomes a Final Order. FCC grant of the application is expected on or about January 25, 2006.¹ The initial term of the lease expires on August 17, 2015, concurrent with expiration of the current term of the WHG396 license. Thereafter, the term of the Agreement renews subject to renewal of the underlying license.² The term of the Agreement is in compliance with secondary markets rules and policies,³ and is not limited to a total term of fifteen years.⁴

¹ 47 C.F.R. §1.9030(e)(1)(iv) (No later than 21 days from the date of the Public Notice listing the lease application as accepted for filing, it will be granted, denied or identified as subject to further review by the Wireless Telecommunications Bureau.).

² 47 C.F.R. §1.9030(g)(2) ("A spectrum leasing arrangement may be extended beyond the initial term set forth in the spectrum leasing application pursuant to the applicable application procedures set forth in §1.9030(e).").

³ See, Report and Order, ¶ 179: "We agree with the commenters that we should extend the rules and policies adopted in the *Secondary Markets Report and Order* to the BRS/EBS spectrum. In the *Secondary Markets Report and Order*, we took important first steps to facilitate significantly broader access to valuable spectrum resources by enabling a wide array of facilities-based providers of broadband and other communications services to enter into spectrum leasing arrangements with Wireless Radio Service licensees. . . . We agree with the commenters that there is no reason to deprive licensees in the BRS/EBS spectrum of the benefits of these rules and policies. We also agree with WCA that extending those rules and policies to the BRS/EBS spectrum will establish regulatory parity with other services that may be used to provide broadband services." See *Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 20604 (2003).

⁴ The former fifteen-15-year lease term limitation for EBS spectrum, that was contained in Section 74.931(e) of Commission rules, was deleted and is not contained in the new Part 27 rules for EBS spectrum.

Attachment C

Application for Consent to *De Facto* Transfer Spectrum Lease from South Fork School District #14 to Unison Spectrum LLC, File No. 0002307943 (filed Sept. 12, 2005; granted Sept. 30, 2005).

Response to Schedule B, Questions 3(a) and 3(b)

Unison Spectrum LLC hereby notifies the Commission that the commencement date for the lease Agreement will be October 3, 2005. If however the Commission has not granted this long term de facto lease application by such date, the commencement date will be the date the FCC approves this application. The lease with respect to the license will not extend beyond: (i) the date such authorization expires by its terms; (ii) the date such application for renewal is dismissed or denied with prejudice by the FCC; or (iii) the expiration of the term or the termination of the Agreement pursuant to the early termination provisions of the Agreement ("Lease Termination Date"). The parties will notify the FCC of the actual Lease Commencement Date and Lease Termination Date once they are determined. The lease is renewable with respect to the license through October 2, 2035, subject to applicable FCC Rules and necessary approvals.

Licenses

CALL SIGN	RADIO SERVICE	LEASE COMMENCEMENT DATE	LEASE TERMINATION DATE
WLX739	ED	10/03/2005	11/19/2012

Attachment D

Application for Consent to *De Facto* Transfer Spectrum Lease from Clarendon Foundation to American Telecasting Development, Inc., File No. 0002443317 (filed Jan. 11, 2006; granted Feb. 1, 2006).

Response to Schedule B, Questions 3(a) and 3(b)

Clarendon Foundation hereby notifies the Commission that the commencement date for the lease Agreement will be February 1, 2006. If, however, the Commission has not granted this long term *de facto* lease application by such date, the commencement date will be the date the FCC approves this application ("Lease Commencement Date"). The lease will not extend beyond: (i) the date such authorization expires by its terms (April 6, 2015); (ii) the date such application for renewal is dismissed or denied with prejudice by the FCC; or (iii) the expiration of the term or the termination of the Agreement pursuant to the termination or expiration provisions of the Agreement ("Lease Termination Date"). The parties will notify the FCC of the actual Lease Commencement Date and Lease Termination Date once they are determined. The lease is renewable through February 1, 2036, subject to applicable FCC Rule.

Attachment E

Application for Consent to *De Facto* Transfer Spectrum Lease from Unified School District #101 to Xanadoo, LLC, File No. 0002488726 (filed Feb. 16, 2006; granted March 16, 2006).

Response to Schedule B, Questions 3(a) and 3(b)

Xanadoo, LLC hereby notifies the Commission that the commencement date for the lease Agreement will be March 9, 2006. If however the Commission has not granted this long term de facto lease application by such date, the commencement date will be the date the FCC approves this application. The lease with respect to the license will not extend beyond: (i) the date such authorization expires by its terms; (ii) the date such application for renewal is dismissed or denied with prejudice by the FCC; or (iii) the expiration of the term or the termination of the Agreement pursuant to the early termination provisions of the Agreement ("Lease Termination Date"). The parties will notify the FCC of the actual Lease Commencement Date and Lease Termination Date once they are determined. The lease is renewable with respect to the license through March 9, 2036, subject to applicable FCC rules and necessary approvals.

Licenses

CALL SIGN	RADIO SERVICE	LEASE COMMENCEMENT DATE	LEASE TERMINATION DATE
WLX283	ED	03/09/2006	02/02/2011

Attachment F

Application for Consent to *De Facto* Transfer Spectrum Lease from Clarendon Foundation to American Telecasting Development, Inc., File No. 0002443497 (filed Jan. 11, 2006; granted Feb. 1, 2006).

Response to Schedule B, Questions 3(a) and 3(b)

Clarendon Foundation hereby notifies the Commission that the commencement date for the lease Agreement will be February 1, 2006. If, however, the Commission has not granted this long term *de facto* lease application by such date, the commencement date will be the date the FCC approves this application ("Lease Commencement Date"). The lease will not extend beyond: (i) the date such authorization expires by its terms (April 21, 2015); (ii) the date such application for renewal is dismissed or denied with prejudice by the FCC; or (iii) the expiration of the term or the termination of the Agreement pursuant to the termination or expiration provisions of the Agreement ("Lease Termination Date"). The parties will notify the FCC of the actual Lease Commencement Date and Lease Termination Date once they are determined. The lease is renewable through February 1, 2036, subject to applicable FCC Rule.

Attachment G

Application for Consent to *De Facto* Transfer Spectrum Lease from Hutsonville Community Unit S.D. #1 to Pegasus Broadband Communications, LLC, File No. 0002443522, (filed Jan. 11, 2006; granted Feb. 1, 2006).

Response to Schedule B, Questions 3(a) and 3(b)

Pegasus Broadband Communications, LLC hereby notifies the Commission that the commencement date for the lease Agreement will be February 1, 2006. If however the Commission has not granted this long term de facto lease application by such date, the commencement date will be the date the FCC approves this application. The lease with respect to the license will not extend beyond: (i) the date such authorization expires by its terms; (ii) the date such application for renewal is dismissed or denied with prejudice by the FCC; or (iii) the expiration of the term or the termination of the Agreement pursuant to the early termination provisions of the Agreement ("Lease Termination Date"). The parties will notify the FCC of the actual Lease Commencement Date and Lease Termination Date once they are determined. The lease is renewable with respect to the license through February 1, 2036, subject to applicable FCC rules and necessary approvals.

Licenses

CALL SIGN	RADIO SERVICE	LEASE COMMENCEMENT DATE	LEASE TERMINATION DATE
WLX548	ED	02/01/2006	05/16/2012

Attachment H

Application for Consent to *De Facto* Transfer Spectrum Lease from Clarendon Foundation to American Telecasting Development, Inc., File No. 0002444950 (filed Jan. 12, 2006; granted Feb. 2, 2006).

Response to Schedule B, Questions 3(a) and 3(b)

Clarendon Foundation hereby notifies the Commission that the commencement date for the lease Agreement will be February 2, 2006. If, however, the Commission has not granted this long term *de facto* lease application by such date, the commencement date will be the date the FCC approves this application ("Lease Commencement Date"). The lease will not extend beyond: (i) the date such authorization expires by its terms (May 6, 2015); (ii) the date such application for renewal is dismissed or denied with prejudice by the FCC; or (iii) the expiration of the term or the termination of the Agreement pursuant to the termination or expiration provisions of the Agreement ("Lease Termination Date"). The parties will notify the FCC of the actual Lease Commencement Date and Lease Termination Date once they are determined. The lease is renewable through February 2, 2036, subject to applicable FCC Rule.

Attachment I

Application for Consent to *De Facto* Transfer Spectrum Lease from Center for Economic and Social Justice to American Telecasting Development, Inc., File No. 0002445035 (filed Jan. 12, 2006 granted Feb. 22, 2006).

Response to Schedule B, Questions 3(a) and 3(b)

The Center for Economic and Social Justice hereby notifies the Commission that the commencement date for the lease Agreement will be February 2, 2006. If, however, the Commission has not granted this long term *de facto* lease application by such date, the commencement date will be the date the FCC approves this application ("Lease Commencement Date"). The lease will not extend beyond: (i) the date such authorization expires by its terms (June 10, 2008); (ii) the date such application for renewal is dismissed or denied with prejudice by the FCC; or (iii) the expiration of the term or the termination of the Agreement pursuant to the termination or expiration provisions of the Agreement ("Lease Termination Date"). The parties will notify the FCC of the actual Lease Commencement Date and Lease Termination Date once they are determined. The lease is renewable through February 2, 2036, subject to applicable FCC Rule.